***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 74-2156

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

**No. 74-2156**

FRED LOWENSCHUSS,

*Plaintiff-Appellant,*

—against—

W. J. KANE, *et al.*,

*Defendants-Appellees.*

## BRIEF OF DEFENDANT-APPELLEE KIDDER, PEABODY & CO. INCORPORATED


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### Statement of the Case

Plaintiff appeals from the judgment of the United States District Court for the Southern District of New York, Honorable Kevin T. Duffy, D. J., dismissing the complaint against defendant-appellee Kidder, Peabody & Co. Incorporated ("Kidder, Peabody"). Judge Duffy's opinion is reported at 367 F. Supp. 911.

While we will address ourselves separately to the three pages of plaintiff's 118-page brief which relate directly to Kidder, Peabody (Bf., pp. 48-50),* we see no reason to address ourselves separately to the other points which

* Appellant Carpenter does not even make reference to Kidder, Peabody in her brief.

plaintiff briefs since, as Judge Duffy ruled, "there is not the slightest scintilla of proof, much less a clear allegation, that Kidder, Peabody even knew or had reason to know, of any infraction." 367 F. Supp., at 914. Rather, Kidder, Peabody acted as nothing more than a "stockbroker." See *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Company*, 356 F. Supp. 1066, 1074 (S.D.N.Y. 1973).

## ARGUMENT

### The Complaint Fails to State a Claim Upon Which Relief Can Be Granted Against Kidder, Peabody

At the outset it should be noted that plaintiff seeks to impose liability upon Kidder, Peabody only as an alleged "aider and abettor" of a claimed Williams Act violation by G & W and defendant Bluhdorn. Plaintiff admits in this Court, as he did below, that he is not seeking to impose contractual liability upon Kidder, Peabody.*

To the extent, therefore, that this Court holds, as did the Court below, that the complaint is grounded in contract, no liability could be imposed upon Kidder, Peabody even if the other defendants were somehow found liable. To this extent the judgment dismissing the complaint as to Kidder, Peabody must be affirmed.

Turning to plaintiff's attempt to impose liability upon Kidder, Peabody as an alleged "aider and abettor", we

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* "The theory on which Kidder, Peabody was sued was that it aided and abetted defendants G & W and Bluhdorn's violation of the Williams Act . . ." (Bf., 48). "[N]o claim is being made against Kidder, Peabody for breach of contract" (Plaintiff's Memo. of Law in Opp. to Motion of Def't Kidder, Peabody to Dismiss Complaint, p. 2).

note that Kidder, Peabody played, at best, a peripheral role in G & W's tender offer and, in essence, acted as nothing more than a "stockbroker." See *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Company, Inc.*, 356 F. Supp. 1066, 1074 (S.D.N.Y. 1973); *Lowenschuss* v. *Kane*, 367 F. Supp 911, 914 (S.D.N.Y. 1973).

Plaintiff's assertions against Kidder, Peabody are, first, that it "aided and abetted" the other defendants in the "preparation of a false and misleading tender offer" and, second, that it somehow "warranted" the legality and propriety of the tender offer to the public.

With respect to the first assertion, plaintiff is complaining, in essence, of the fact that Kidder, Peabody, as a non-underwriting "dealer-manager", provided professional services to G & W. Standing alone, this does not provide a sufficient basis for the imposition of liability. See *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 373, fn. 27 (2d Cir. 1973).

The second assertion similarly fails to state a cause of action against Kidder, Peabody. As noted, Kidder, Peabody was merely a "dealer-manager" and it was not the underwriter of any securities. Plaintiff offers no authority, and we are aware of none, for the proposition that Kidder, Peabody has, in these circumstances, "warranted" the tender offer and that it, consequently, can be liable for the failure of the tender offer. The second assertion adds no legally cognizable claim to the first assertion that Kidder, Peabody aided and abetted in the preparation of an allegedly false and misleading tender offer.

Liability as an "aider and abettor" requires that Kidder, Peabody must have "knowingly and substantially

assisted the violation".* *SEC* v. *Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974); Ruder, "Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, *In Pari Delicto*, Indemnification, and Contribution," 120 *U. Pa. L. Rev.* 597, 630 (1972). It has not been alleged, nor could it be seriously contended, that Kidder, Peabody "knowingly and substantially" assisted the alleged violation. Other than alleging that Kidder, Peabody somehow "warranted" the tender offer, all that plaintiff alleges is the general conclusory allegation that Kidder, Peabody "aided and abetted . . . in the making of said offer to the general public" (App. 13a).

A general conclusory allegation of the sort made against Kidder, Peabody is not sufficient to state a cause of action under Section 10(b) of the Securities Exchange Act of 1934. Rule 9(b), Fed. R. Civ. P.; *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442 (2d Cir. 1971); *Segal* v. *Gordon*, 467 F.2d 602, 606-607 (2d Cir. 1972); *Kellman* v. *ICS, Inc.*, 447 F.2d 1305, 1309 (6th Cir. 1971); *cf. Schlick* v. *Penn-Dixie Cement Corp.* (2d Cir.; Oct. 31, 1974), slip op. at 5851-5853. Because of the near-identity of Sections 10(b) and 14(e) of the Act with respect to the types of conduct proscribed by these sections, the *Shemtob* standard should be equally applicable for a pleading purporting to state a claim under § 14(e) of the Act. See *Segal* v. *Gordon, supra*, 467 F.2d at 608, regarding "lack of specificity" as a defect in an amended complaint under § 14(e). "[P]laintiffs' claim . . . cannot be bootstrapped

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* While plaintiff relies on *SEC* v. *Spectrum, Ltd.*, 489 F.2d 535 (2d Cir. 1973) for the proposition that a negligence standard should be applied to an alleged aider and abettor (Bf., 49), he ignores the fact that the holding which he cites was limited to "enforcement proceedings seeking equitable or prophylactic relief," Id., at 541. See *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1304-1305 (2d Cir. 1973).

into an alleged violation of § 10(b) of the Exchange Act, or Rule 10b-5, in the absence of allegation of facts amounting to *scienter*, intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud." *Shemtob* v. *Shearson, Hammill & Co., supra,* 448 F.2d at 445. *Lanza* v. *Drexel & Co., supra,* 479 F.2d at 1304-1305.

## CONCLUSION

**For the reasons stated above, the judgment dismissing the complaint as to Kidder, Peabody & Co. Incorporated should be affirmed.**

Respectfully submitted,

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December 23, 1974

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